(27)

FILED

FEB 8 - 2006

OFFICE OF THE CLERK

Nos. 04-1528 et al.

In The Supreme Court of the United States

NEIL RANDALL ET AL.,
Petitioners,
v.
WILLIAM H. SORRELL ET AL.,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE ET AL.,
Petitioners,
v.
WILLIAM H. SORRELL ET AL.,
Respondents.

WILLIAM H. SORRELL ET AL.,
Petitioners,
v.
NEIL RANDALL ET AL.,
Respondents.

On Writs Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF EQUAL JUSTICE SOCIETY, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ELLA BAKER CENTER FOR HUMAN RIGHTS, LATINO ISSUES FORUM, GREENLINING INSTITUTE, ASIAN AMERICAN JUSTICE CENTER, CENTER FOR GOVERNMENTAL STUDIES, CALIFORNIA CLEAN MONEY CAMPAIGN, COALITION FOR ECONOMIC EQUITY, AND CALIFORNIA WOMEN'S AGENDA AS *AMICI CURIAE* IN SUPPORT OF WILLIAM H. SORRELL

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INTEREST OF AMICI CURIAE[1]

Amici are organizations committed to improving the lives of all people, but particularly communities of color and the underserved. The Equal Justice Society, National Association for the Advancement of Colored People, Asian American Justice Center, Latino Issues Forum, Greenlining Institute, Ella Baker Center for Human Rights, and Coalition for Economic Equity work to advance the legal and civil rights of communities of color through community education, legal advocacy, public policy research and other efforts. They believe campaign finance reform is necessary to ensure meaningful and adequate participation in the political process.

The Center for Governmental Studies, California Clean Money Campaign and California Women's Agenda join the *Amici* listed above. The Center for Governmental Studies and the California Clean Money Campaign work to ensure that elected officials are receptive to the concerns of all their constituencies and to improve fairness and transparency in government policies and processes. The California Women's Agenda seeks to better the lives of women in all arenas, including the political process. These organizations join this brief because they too believe that campaign finance reform is necessary to guarantee meaningful access to the political process and to elect national and local governments responsive to the needs and concerns of communities of color.

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[1]Pursuant to Supreme Court Rule 37.3(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

In an ideal world, men and women of perfect virtue, vision and diversity are elected to public office. They enact laws and approve policies for the greater good unaffected by the special interests and persistent urgings of their most generous contributors. They steadfastly refuse to compromise beliefs, analyses or principles for reelection, their next targeted public office or their own ultimate financial well-being. And, campaigning for office in that ideal world would not necessitate raising and spending tens or hundreds of millions of dollars.

Few issues engender as much fire and energy as campaign finance reform. And that is because in the real world it really matters. It matters to incumbents, to their potential challengers, to vested interests and to citizens, including the communities of color sponsoring this brief—communities of citizens effectively shut out of meaningful participation in our political process. The massive amount of money contributed to and expended on campaigns for public office has an undeniable and monumental impact on who gets elected, who gets access to and is heard by those who are elected and on the ultimate decisions about issues affecting all citizens. It matters in this case because, as the Second Circuit recognized, campaign financing in Vermont is "a far cry from this idyllic vision." *Landell v. Sorrell*, 382 F.3d 91, 118 (2d Cir. 2004) ("*Landell II*") (citing statement of William T. Doyle).

The hard truth is that access, influence and meaningful participation are the private reserve of those who can pay to play in this no-limit game. And the interests and attitudes of those who can pay are very often very different from those who are members of *Amici* organizations on issues such as health care, wages, taxes, public schools, farms and factory

conditions, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

It is the unified position of the organizations who respectfully file this brief that the single greatest obstacle to the ability of communities, municipalities, counties, states and Congress to redress the exclusion of communities of color from the political process is the notion that *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) absolutely bars any attempt to balance the rights of candidates to express freely their ideas with the rights of citizens to participate meaningfully in the political process. Local, state and national electorates have a strong and compelling interest in promoting greater diversity among political participants, preventing corruption and the appearance of corruption, and fostering a belief in the openness and fairness of our form of government—interests best served by contribution and expenditure limits carefully calibrated to respect candidates' rights of expression.

Forty years ago, with the passage of the Voting Rights Act of 1965, this country affirmed its commitment to the principle that all citizens are created equal in the eyes of democracy. Today, the organizations filing this brief submit that the single most important civil rights issue in American politics is the virtual exclusion of communities of color from the electoral process solely attributable to uncontrolled campaign spending. As Martin Luther King, Jr. said, succinctly and with insight in his famous "I Have A Dream" speech at the Lincoln Memorial in 1963: "We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing to vote for."

STATEMENT OF FACTS

I.

VERMONT ENACTED ACT 64 TO PREVENT CORRUPTION AND THE APPEARANCE OF CORRUPTION AND TO PROMOTE MEANINGFUL PARTICIPATION IN THE POLITICAL PROCESS.

In 1997, the legislature of Vermont passed a comprehensive campaign reform act known as Act 64. 1997 Vermont Campaign Finance Reform Act, codified at VT. STAT. ANN. tit. 17, §§2801–2883 ("Act 64"). Campaign finance regulation is not new to the state of Vermont. Prior to Act 64, the Vermont legislature adopted laws regulating campaign financing in 1916, 1961 and 1971. *See Landell v. Sorrell*, 118 F. Supp. 2d 459, 464 (D. Vt. 2000) ("*Landell I*"). But faced with increasingly and prohibitively expensive campaigns, Act 64 represents the first attempt of the legislature of Vermont to adopt campaign spending limits since this Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in 1976.[2]

Act 64 is a comprehensive campaign finance reform package that includes regulations of contributions and expenditures related to campaigns for state office. In relevant part, Act 64 limits the amount of expenditures a candidate may make during a two-year election cycle in accordance with the position being sought and the size of contributions that candidates, political committees and

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[2]The complete statement of relevant facts is contained in the court decisions below as well as in Respondent's brief. This brief only concentrates on the points particularly relevant to issues of meaningful political participation for communities of color.

political parties may receive from a single source during a two-year election cycle. *Landell II*, 382 F.3d at 99.

The Vermont legislature found such limits necessary because candidates and elected officials respond and grant access to contributors who make large contributions in preference to those who make small or no contributions. *Landell II*, 382 F.3d at 101. Expert testimony considered by the Vermont legislature showed that "public officials are functionally compelled to sell privileged access through the fundraising system." *Id.* at 100. As Vermont senator Peter Shumlin acknowledged, "[t]here's no question (money) buys access to the system . . . ." *Landell I*, 118 F. Supp. 2d at 465 (parenthetical in original). The trial court found that the Vermont legislative records suggest "that large contributors often have an undue influence over the legislative agenda." *Id.* at 468.

Given the foregoing findings, it is unsurprising that the Vermont legislature also found that increasing amounts of unregulated campaign expenditures accompany decreasing public involvement and confidence in the electoral process. *Landell I*, 118 F. Supp. 2d at 468–69. One expert testified that "nearly 75 percent of Vermont voters say that ordinary voters do not have enough influence over Vermont politics and government." *Landell II*, 382 F.3d at 116.

Indeed, the Vermont legislature found that Act 64 was necessary to implement Article 8 of Chapter I of the Vermont Constitution, which states that "all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office . . . ." *Landell I*, 118 F. Supp. 2d at 468.

II.

THE INCREASING EXPENSE OF CAMPAIGNS EFFECTIVELY PREVENTS MEANINGFUL POLITICAL ACCESS BY COMMUNITIES OF COLOR.

Running for office has become an extraordinarily expensive undertaking. In the 2002 and 2004 election cycles, candidates for the U.S. Senate and House of Representatives raised nearly two billion dollars. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: STATS AT A GLANCE. In 2002, the average winning candidate for the United States House of Representatives raised nearly $1 million; the average winning candidate for the Senate raised over $5.2 million. *Id.* The 2004 presidential race was the most expensive in history, with both parties' nominees forgoing public funding in the primary and raising nearly $650 million between them. *Id.*

Although attention usually focuses on spending in federal elections, big money pervades state government politics, too. The Institute on Money in State Politics, a nonpartisan, nonprofit organization, compiled nationwide data on the 2000 state legislative and gubernatorial elections. THE INSTITUTE ON MONEY IN STATE POLITICS, 2000 STATE ELECTION OVERVIEW (Aug. 2002). The study showed that candidates running for a House seat raised an average of $46,123; their Senate counterparts raised over twice that amount, an average of $100,976. *Id.* at 6. The fifty-nine major party gubernatorial candidates spent a combined $115.3 million—an average of nearly $2 million per candidate. *Id.* at 8.

More significant than the bare numbers is the direct impact that fundraising has on a candidate's chances of winning. In the 2002 Congressional primaries, candidates

who raised the most money won in nine out of ten races. ADAM LIOZ, U.S. PIRG EDUCATION FUND, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY 7 (Jan. 2003) (hereafter "PIRG STUDY"). In general elections, 94% of the biggest fundraisers emerged victorious. *Id.* Incumbents raised vastly more money than their challengers and were extraordinarily successful: 98% of House incumbents were reelected and 85% of Senate incumbents were reelected. CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: INCUMBENT ADVANTAGE.[3] At the state level in 2000, 83% of candidates who raised the most money won. 2000 STATE ELECTION OVERVIEW, *supra*, at 4. The thirteen winning gubernatorial candidates outspent their opponents by an average of $1.2 million.[4] *Id.* at 8.

Some argue that limits on campaign spending will not allow challengers to spend enough to defeat incumbents, but the numbers cited above demonstrate beyond a doubt that incumbents beat challengers even without spending limits. Incumbents are a proven commodity so fundraising for them is an easier sell. And contributions to incumbents offer both the benefit of immediate positive influence and the opportunity to place a bet on a proven winner. Available data suggests that campaign limits may produce a different outcome and encourage genuine challenges.[5]

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[3] *At* http://www.opensecrets.org.

[4] On average winners raised $4.1 million, while losers raised only $2.9 million.

[5] In 1974, the citizens of Albuquerque, New Mexico, voted to amend the City Charter, adopting a code of ethics, limits on and disclosure of campaign contributions, and limits on campaign spending. *Homans v. Albuquerque*, 366 F.3d 900, 902 (10th Cir. 2004). Between 1974 and 1995, candidates successfully challenged all four of Albuquerque's incumbent mayors who ran for reelection. *Homans v. Albuquerque*, 217 F. Supp. 2d 1197, 1200 (D.N.M. 2002). By contrast, nationally, in 1999, incumbent mayors won 88% of their races, and in 2000, incumbents won 126 out of 140 elections. Jubi Headley and Jim

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In the current pay-to-play system, candidates who lack personal wealth[6] or access to networks of wealthy donors, or whose positions do not appeal to large contributors, cannot compete. A 2003 survey by the U.S. PIRG of federal candidates in the 2002 election cycle who dropped out of races, lost primaries or lost general elections shows that credible candidates, including many candidates of color who are committed to representing communities in great need of representation, are simply unable to raise the funds necessary to compete.[7]

This money-centered focus renders candidates representing minority interests unable to compete for campaign dollars. In 42 out of 50 states legislatures,

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Welfley, *Election Results Indicate Voter Satisfaction with Local Public Servants: Incumbents Win 80 Percent of Their Elections* (Nov. 20, 2000). The amendments were enjoined in 2001. *Homans*, 366 F.3d at 903.

[6]Nearly 43% of the incoming freshman Members of Congress in 2002 were millionaires, compared with 1% of the U.S. voting age population. PIRG STUDY, *supra*, at 6.

[7]For example, Nathaniel Stampley, a pastor in Wisconsin, decided to run because there had never been an African-American Congressman from Wisconsin. PIRG STUDY, *supra*, at 41. Dr. Stampley raised $7,000 and garnered over 28% of the vote in the primary. *Id.* at 42. His opponent, incumbent Jerry Klezczka, raised $459,000. *Id.* Ben Allen, an African-American attorney, teacher and state representative in Georgia, contributed $20,000 of his own money and raised another $5,300. *Id.* at 17. Although he made it to a run-off, the winner, Charles "Champ" Walker, outspent Allen by $300,000. *Id.* at 18. Leo Martinez, the son of Mexican laborers, lost the Second District Republican primary in New Mexico. *Id.* at 30. Martinez ran a grass-roots campaign and raised $18,000, but lost to the top money raiser. *Id.* Gary Collins, a lawyer and member of the Executive Committee of the Middlesex County NAACP, dropped out of the primary for the Second District in Connecticut. *Id.* at 15. Mr. Collins recounted the story of an African-American woman who came up to him in the street after hearing him speak and handed him $2 dollars in change from her purse to support his campaign. Mr. Collins concluded, "She believed in me enough to want to give me that money, but she didn't understand that even if everyone in town gave me $2 in change, that's not going to get you there." *Id.* at 16.

minority legislators in 2003 raised less money for their next reelection campaign, on average, than their White counterparts. THE INSTITUTE ON MONEY IN STATE POLITICS, MONEY AND DIVERSITY IN STATE LEGISLATURES, 2003, at 22 (Apr. 2005). Individually, 81.5% of all minority state legislators raised less money than the average raised by the White legislators in their state. *Id. See also* Jason P. Conti, *The Forgotten Few: Campaign Finance Reform and Its Impact on Minority and Female Candidates*, 22 B.C. THIRD WORLD L.J. 99 (2002) (challenger minority candidates have a more difficult time raising money than White candidates).

The current campaign financing regime similarly results in the significant underrepresentation of racial minorities in elected federal positions.[8] In the current U.S. Senate, there are only five non-White Senators.[9] Historically, only five African-Americans, five Latinos, three Native-Americans, and five Asian-Americans have served in the United States Senate. In the United States House of Representatives, 75 of 438 current members are people of color even though people of color make up approximately a quarter of the population. MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 109TH CONGRESS: A PROFILE, CRS Rep. No. RS22007, at 5 (Oct 25, 2005), *available at* www.georgetown.edu/faculty/wilcoxc/joyce.htm.

The necessity of raising tens, even hundreds, of thousands of dollars gives the very small segment of the population capable of writing very large checks an oversized role in determining who gets elected. In the 2002 election,

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[8]Because state office often leads to federal office, pricing candidates of color out of state elections reduces the number of viable candidates of color for federal office.

[9]*See* Minorities in the Senate, *available at* http://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm (last visited Jan. 11, 2006).

less than one-quarter of one percent of the voting age population of the United States made a contribution of more than $200 to a congressional candidate. ADAM LIOZ, U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 15 (July 2003). Less than one-tenth of one percent of the population made a contribution of $1,000 or more. *Id.* And yet this handful of large donors contributed over three-quarters of the individual contributions to congressional candidates. *Id.* at 16–17.

The donors who fund these expensive races are an elite group whose demographics bear little relationship to the country at large. This was the conclusion of a nation-wide survey of over 1,000 donors who gave at least $200 to congressional candidates in the 1995–96 election cycle. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUB. PERSP. 29 (2000).[10] The study also identified an additional list of "most active donors"—donors who gave money to at least eight candidates and/or gave at least $8,000. *Id.* at 29–30. The researchers concluded that "donors to House and Senate candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of the donors surveyed had annual incomes of over $100,000 and over 80% were college graduates. *Id.* Among the most active donors, over half had annual incomes of over $500,000, and only 4% had annual incomes of less than $100,000. *Id.*

Critically, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race: 99% of the donors were non-Hispanic White. *Id.* Similarly, a recent study of donors to the 1972, 1988 and 2000 presidential primary

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[10]This survey was conducted by professors and doctoral students at the University of Maryland, the University of Akron and Georgetown University.

campaigns by Clyde Wilcox, Professor of Government at Georgetown University, found that among donors of $200 or more, 86% had incomes over $100,000, but approximately 96% were non-Hispanic White. Clyde Wilcox, *Individual Donors in the Presidential Nomination Process*, Tables 2 and 3 *in* THE CHANGING DONOR? INDIVIDUAL CONTRIBUTORS IN PRESIDENTIAL ELECTIONS 1972–2000 (Alexandra Cooper et al. eds., forthcoming).

Economic barriers to meaningful political participation fall most heavily on the growing population of minorities. Despite the gains of the civil rights movement and growing numbers of minority citizens,[11] the gap in White versus non-

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[11]The racial composition of the United States has changed significantly since *Buckley* was decided in 1976. As evidenced by national census figures, the nation has become increasingly racially diverse. In 1976, 13% of the United States population was non-White, and the vast majority of non-Whites were African-American. U.S. CENSUS BUREAU, RESIDENT POPULATION PLUS ARMED FORCES OVERSEAS—ESTIMATES BY AGE, SEX, AND RACE: JULY 1, 1976. Over the decades, Whites have accounted for a steadily shrinking percentage of the population. While Whites accounted for 87% of the population in 1976 (*id.*), they accounted for only 77% of the U.S. population in 2004. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2004. Conversely, the percentage of minorities in the U.S. almost doubled between 1976 and 2004, from about 13% to approximately 23% of the population in 2004. Between 1990 and 2000 alone, the minority population in the United States grew by 43%. FRANK HOBBS AND NICOLE STOOPS, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY: CENSUS 2000 SPECIAL REPORTS 77 ("DEMOGRAPHIC TRENDS") (Nov. 2002).

Not only has the number of racial minorities increased, the diversity among racial minorities has increased as well. In 1976, over 98% of the population was classified as either White or Black. RESIDENT POPULATION PLUS ARMED FORCES OVERSEAS—ESTIMATES BY AGE, SEX, AND RACE: JULY 1, 1976. Today, of the over 23% of Americans who identify themselves as non-White, more than half are Hispanic, American Indian and Alaska Native, and Asian and Pacific Islander. DEMOGRAPHIC TRENDS, *supra*, at 77.

Vermont, too, has seen demographic shifts although it remains a state with very small numbers of minority group residents. Though 97% of Vermont's 608,827 residents identify as White, Vermont has followed

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White incomes has remained constant over the past twenty years. MICHAEL A. STOLL ET AL., AFRICAN AMERICANS AND THE COLOR LINE (The American People Census 2000 Series 2004). Minorities have significantly lower incomes than non-Hispanic Whites. In 2000, median annual family income in the United States was $52,000 while the Black family median annual income was $31,000. *Id.* at 13. Put another way, the median Black family in 2000 had an annual income equal to the national median in 1965.

This gap in wealth between non-Hispanic Whites and minorities appears to be growing. A recent study from the Pew Research Center finds that between 1996 and 2002, the median Black and Hispanic household wealth declined by 27%—while the median non-Hispanic White household wealth increased by 2%. RAKESH KOCHAR, PEW HISPANIC CENTER, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996–2000 AS OF 2002, at 2 (Oct. 2004). The median White household wealth was $88,651—nearly fifteen times that of the median Black household wealth, which was $5,988, and eleven times that of the median Hispanic household wealth, which was $7,932. *Id.*

It is this lack of money—not a lack of interest—that prevents minorities from effectively participating in the political process. The landmark "Citizen Participation Study"[12] found that differences in levels of activity between

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the national trend of growing diversity. U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA (PUBLIC LAW 94-171) SUMMARY FILE, Matrices PL1 and PL2. Between the 1960s and the 1990s, the numbers of African-Americans, American Indians and Alaska Natives, and Asians and Pacific Islanders increased almost tenfold. DEMOGRAPHIC TRENDS, *supra*, at A-21 to A-23.

[12]Sidney Verba, Professor of Government at Harvard University, Kay Lehman Schlozman, Professor of Political Science at Boston College, and Henry Brady, Professor of Political Science at the University of California, Berkeley, conducted a large-scale, two-stage scientific survey of the voluntary activity (political, charitable and

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Whites and non-Whites were far less sharp where the activity involved time rather than money. *Id.* at 467–69. For example, while minorities donate about one percent of all political contributions, they vote at approximately the same rate as Whites. In the November 2000 elections, 53.5% of Blacks and 56.4% of Whites reported voting. U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2000 (2002). Similarly, in the November 2004 election, 56.3% of Blacks, as compared to 60.3% of Whites, reported voting. U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2004 (2005). Minorities simply lack the disposable income that their White counterparts have to contribute to campaigns in great numbers.

In *Color of Money: 2003*, Public Campaign, a nonpartisan, public interest organization, studied the relationship between campaign money and race and showed that neighborhoods of color are severely underrepresented in the campaign finance system.[13] Nearly 90% of the more than $2 billion contributed by individuals in the two most recent federal elections came from ZIP codes that are majority non-Hispanic White ($1.7 billion—85%—came in

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(. . . continued)
religious) of the American public. Sidney Verba et al., *Race, Ethnicity, and Political Participation*, *in* CLASSIFYING BY RACE 354, 355–56 (Paul E. Peterson ed., 1995).

[13]Public Campaign organized the records of more than $2 billion in individual contributions greater than $200 to federal candidates, parties and Political Action Committees during the 2000 and 2002 election cycles by donor's ZIP code. PUBLIC CAMPAIGN, COLOR OF MONEY: 2003, at 1 (Major Findings) (2003). It then compared those records with data on race, ethnicity and income from the 2000 U.S. Census, using ZIP codes as the bridge between information on campaign contributions (which does not include race or ethnicity of donors) and the census data.

the form of contributions of $1,000 or more). In comparison, just 2.8% of campaign funds came from predominantly African-American ZIP codes, 1.8% from predominantly Latino ZIP codes, and 0.6% from predominantly Asian and Pacific Islander neighborhoods. *Id.* at 2.

The top contributing ZIP code nationwide—10021 on Manhattan's Upper East Side—is 86% non-Hispanic White, and nearly 40% of its households have incomes of over $100,000. This *one* ZIP code contributed more campaign cash than did the 532 ZIP codes nationwide with the largest percentage of African-American residents (representing 7,654,609 people ages 18 and over, 84 times more people than live in 10021); the 533 ZIP codes nationwide with the largest percentage of Latino residents (representing 9,355,643 people ages 18 and over, 102 times more people than live in 10021) and the 167 ZIP codes nationwide with the largest percentage of Asian Pacific American population (representing 3,523,852 people ages 18 and over, 39 times more people than live in 10021). *Id.* at 2. In other words, the evidence demonstrates first, and unsurprisingly, that the most affluent Whites are vastly ***overrepresented*** in political giving and, second, that minorities, who are overrepresented among the lowest economic levels in America, are severely *underrepresented* among campaign donors.

As diversity increases, the American political landscape necessarily changes. The prominence of issues that uniquely affect communities of color shows that the decades since *Buckley* have brought forth such change. Despite the radical demographic shifts and changing political landscape, communities of color continue to struggle to be heard and for equal treatment. As evidenced by the Court's decision in *Grutter*, there remains a compelling need to intervene and to correct the persisting symptoms of past racial discrimination. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

Today, the increasing cost of campaigns recreates the racial disparity and exclusion of communities of color. If the voices of Americans of color continue to be drowned out by moneyed interests, America will fail at least a quarter of its population. Ensuring that all individuals—no matter their race or color—have meaningful opportunities to participate in and influence the political process is essential to the success of American democracy.

LEGAL ARGUMENT

I.

BUCKLEY DOES NOT ESTABLISH A PER SE PROHIBITION AGAINST EXPENDITURE LIMITS.

In *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam), this Court did not hold that expenditure limits were per se prohibited, but rather held that "[n]o governmental interest *that has been suggested* is sufficient to justify the restriction on the quantity of political expression imposed . . . ."[14] *Id.* at 55 (emphasis added). Based on a slim court record, the Court assumed that "there is nothing invidious, improper, or unhealthy in permitting such [unlimited] funds to be spent to carry the candidate's message to the electorate." *Id.* at 56. As the Second Circuit correctly recognized, "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell II*, 382 F.3d at 107–08.

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[14]Because the scope and effect of *Buckley* with respect to expenditures is thoroughly addressed in the parties' briefs as well as in the Second Circuit's opinion in this case, *Amici* focus instead on the fact that expenditure limits are necessary to and justified by the rights of citizens to participate meaningfully in the political process.

In the decades since *Buckley*, empirical evidence reveals that the percentage of minorities who are able to contribute financially to campaigns is almost negligible[15] and that a candidate's financial support bears little relation to his or her support among minority constituents. Support for a particular candidate by communities of color has become irrelevant in an America where the vast majority of campaign contributors are non-Hispanic White.

To be sure, given the large number of minority voters nationally, presidential candidates consider the views of leaders representing communities of color and, in certain states with significant numbers of voters of color, some access is granted by gubernatorial and Senate candidates, especially during the campaign period. But as all studies reflect, access thereafter is very highly correlated with campaign contribution dollars. This disparity leads to at worst, the appearance or actuality of corruption, and at best, an unfair and exclusionary system.

Because contribution limits alone have not—indeed, cannot—adequately further the government's interest in protecting the political process from both actual corruption and apparent corruption, states should be allowed the flexibility to craft well-researched and carefully thought-out campaign finance reform laws that utilize a variety of mechanisms, including reasonable expenditure limits. Without such flexibility, communities of color will continue to be shut out of meaningful participation in our democratic process.

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[15]This lack of participation is not due to a lack of interest as differences in participation rates between Whites and non-Whites became far less pronounced when the political participation involved time instead of money. *See* discussion at p.10, *supra*.

II.

PROMOTING MEANINGFUL PARTICIPATION IN THE POLITICAL PROCESS IS AN ADDITIONAL COMPELLING INTEREST SUFFICIENT TO SUPPORT VERMONT'S REASONABLE LIMITS ON CAMPAIGN SPENDING.

Vermont put forth five interests that it believed were sufficiently compelling to warrant its reasonable limits on campaign spending. The Second Circuit found that two of those interests—"avoiding the reality and appearance of corruption in elective politics and government" and assuring that "candidates and officeholders [will] spend less time fund-raising and more time interacting with voters and performing duties"—taken together, supported Vermont's expenditure limits and declined to evaluate the remaining interests. *Landell II*, 382 F.3d. at 115, 125.

Among the three interests advanced by Vermont that the Second Circuit did not evaluate was Vermont's interest in "protecting equal access to political participation." *Id.* at 115. Although the sufficiency of this interest was not discussed by the Second Circuit, the *Landell I* court acknowledged that spending limits are an appropriate response to the compelling governmental interest of "[p]rotecting access to the political arena." 118 F. Supp. 2d at 482–83. In fact, the *Landell I* court found that "the categorical preservation of free speech and association cannot lay waste to our other core democratic values such as effective representation, equal access to the political system, and honest, responsive government." *Id.* at 493.

The *Landell I* court correctly recognized it was charged with reconciling competing interests. Indeed, *Amici* believe that the tension between the interest in ensuring meaningful participation in the political process for all members of the

electorate and the First Amendment interests in political speech lies at the heart of the debate over the constitutionality of campaign expenditure limits. As the *Landell I* court noted, "the exercise of those [free speech] freedoms by some through large money contributions in our political system threatens to drown out the freedoms of speech and association of so many others." 118 F. Supp. 2d at 493.

Courts balance competing constitutional interests often. Indeed, this Court has recognized the need to balance First Amendment protections of political speech against core democratic interests. As Justice Breyer pointed out in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the "Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ."[16] *Id.* at 402 (Breyer, J., joined by Ginsburg, J., concurring). When faced with these competing interests, the Court does not privilege one interest over another, but weighs the interests and seeks solutions that maintain the integrity of American democracy. *See id.*

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[16]Examples of this balance abound. In *Nixon*, Justice Breyer offered two examples where speech has been restricted to protect other core democratic interests. Specifically,

> in Congress, for example, . . . constitutionally protected debate, Art. I, §6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate. (*Nixon*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring) (citing *Storer v. Brown*, 415 U.S. 724, 736 (1974)))

Similarly, in *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld restrictions under the Hatch Act limiting the political activity of federal employees. Even in *Buckley*, when evaluating contribution limits, the Court weighed the government's interest in the prevention of corruption against First Amendment freedoms.

While expenditure caps limit to some extent the paid political expression of a wealthy few, they are important to ensure Americans, especially its people of color, can meaningfully participate in the political process. Any analysis of expenditure limits must keep in mind that the special attention given to political expression under the First Amendment is rooted in the protection of these democratic principles.

A campaign finance system without expenditure limits excludes those without the means to compete in fundraising, many of whom are members of racial minority groups. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court recognized that government has an essential interest in promoting political participation by Americans of color: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. The *Grutter* Court found a compelling government interest in ensuring that minorities participate in American's education system and stated that this compelling interest arises in part because universities, and in particular, law schools, are training grounds for many of the nation's leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

But the government's interest in promoting a visibly open path to leadership does not end at the gates of universities and law schools. The electoral process is the primary gateway to government leadership, and the government has a vital interest in keeping America's political system open to all members of society. As we work together as a country to provide equal educational opportunity to minority students (and full participation at all levels in our armed forces), we undermine these accomplishments if we effectively deprive the graduates of these programs of office,

of access, and of a sense that the government understands and is receptive to their views.

This Court has endorsed important interests of the government in promoting meaningful political participation. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court acknowledged that "[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government are interests of the highest importance." *Id.* at 206 n.88 (citation and internal quotation marks omitted). Political participation interests were also at stake in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where the Court upheld a prohibition on corporate expenditures designed to combat "corrosive and distorting effects of immense aggregations of wealth." *Id.* at 660. Indeed, the interests of the government in encouraging meaningful political participation are integrally related to the government interests in preventing corruption and the appearance of corruption set forth in *Buckley*. An unequal election in which only a select number of high bidders can meaningfully participate is an election that appears up for sale.[17]

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[17]In an *amicus* brief submitted to the Court, Senator Mitch McConnell challenges Vermont's interest in "protecting equal access to political participation." *See* McConnell Amicus Brief at 13-18. Although the *Buckley* Court found that the "interest in equalizing the financial resources of candidates" is not a convincing justification (*Buckley*, 424 U.S. at 56), it did not reject the interest in protecting access to political participation. Meaningful political participation is simply not synonymous with "the equalization of political speech" interest rejected in *Buckley*.

Neither Respondents nor *Amici* argue for reasonable campaign spending limits based on an abstract principle that all candidates should have the same amount of money to spend. Such an argument misses the point. Rather, at issue here are the consequences of entirely unrestrained spending, as documented by the Vermont legislature and in study after study, including the resulting virtual exclusion of communities of color from the political process and from political office. Nothing less.

This Court's decisions based on the Equal Protection Clause striking down wealth barriers to voting and running for office also address the constitutional issues at stake. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), the Court invalidated a poll tax of $1.50 in Virginia state elections, declaring that "Voter qualifications have no relation to wealth . . . ." *Id.* at 666. Moreover, the right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of candidates, regardless of wealth, to participate meaningfully as well. *See id.* In *Bullock v. Carter*, 405 U.S. 134 (1972), the Court recognized the "real and appreciable impact on the exercise of the franchise" caused by a system that excludes candidates on the basis of their lack of wealth, striking down filing fees ranging from $150 to $8,900 that candidates for local office in Texas were required to pay to their political parties. *Id.* at 144; *see id.* at 136–41 & nn.1–17. The Court concluded that heightened scrutiny of such candidate filing fees was warranted because the high cost of running in a primary election would limit voter choice:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. (*Id.* at 143)

"[W]e would ignore reality," the Court continued, "were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.*; *see also Lubin v. Panish*, 415 U.S. 709, 718 (1974) (striking down $700 filing fee for local California election).

America's constitutional Framers recognized that "establishing a political equality among all" was a primary remedy for calling democratic representatives to account.[18] The diminishment of minorities' rights to participate in the political process also touches on fundamental constitutional interests. Congress recognized these interests when it enacted the Voting Rights Act in response to "an upsurge of public indignation against the systemic exclusion of Negroes . . . ." H.R. REP. NO. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to the Act's passage, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465–66 (General Statement of Republican Views).

Even as it enacted major reform, Republican Congressmen predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . .

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[18] 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. eds., 1983); *see also* THE FEDERALIST NO. 57, at 305, 386 (James Madison) (J. Cooke ed., 1961).

> It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices. (*Id.* at 2471)

The corruption predicted in 1965—ballot stuffing and coercion of voters—was, of course, of a more virulent variety than exists today. But, there are other types of unfair influence that now beset our political system and shut out those most in need of representation. Without the ability to limit the unceasing race for funds with which they may outspend opponents, candidates for office are forced to give access and time to those who can provide money.

The Court in *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." 424 U.S. at 48–49. As Justice Breyer suggested in a recent discussion of this passage, however, "those words cannot be taken literally." *Nixon*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). One valid basis for upholding limits on campaign expenditure limits, Justice Breyer noted, is that "such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process." *Id.* at 401 (citations omitted). The Court's approach should be informed by the fact that "constitutionally protected interests lie on both sides of the legal equation." *Id.* at 400.

Today what must be "wholly foreign" is a political system in which free speech is measured only in dollars and in which major segments of society are excluded and are as powerless to influence the choice of candidates and public policy as they were decades ago. Legislators and citizens can and should be permitted to balance competing and compelling government interests with carefully drawn limits that still protect—indeed encourage and permit—widespread communication of ideas and positions. The Vermont

legislature did so in enacting Act 64. The district court and Second Circuit did so in upholding parts of Act 64 and *Amici* ask that it be sustained.

The Court's decision will not only affect the citizens of Vermont, but it will determine whether the next generation of Americans of color throughout the nation will be given a voice and a place at the political table.

CONCLUSION

Amici urge the Court to hold that governments have compelling interests in promoting meaningful participation by *all* members of the electorate and that this interest is sufficient to support Vermont's limits on campaign spending.

DATED: February 8, 2006.

Respectfully,

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